STATE OF MICHIGAN

COURT OF APPEALS

RICHARD SANDERS, CAROL SANDERS, JOHN YOUNGBLOOD, MARY JO YOUNGBLOOD, ARTHUR J. LOMBARD, and CHUBB GROUP OF INSURANCE COMPANIES, as Subrogees of RICHARD SANDERS and CAROL SANDERS,	UNPUBLISHED February 14, 2012
Plaintiffs-Appellees,	
v	No. 300486 Wayne Circuit Court
CITY OF GROSSE POINTE FARMS,	LC No. 09-002544-NZ
Defendant-Appellant.	

Before: SERVITTO, P.J., and TALBOT and K. F. KELLY, JJ.

PER CURIAM.

The City of Grosse Pointe Farms ("the City") appeals as of right the trial court's order denying its motion for summary disposition based on governmental immunity and partially granting summary disposition in favor of Richard Sanders, Carol Sanders, John Youngblood, Mary Jo Youngblood, Arthur J. Lombard and Chubb Group of Insurance Companies ("the Homeowners") with respect to whether the City is an "appropriate governmental agency" for purposes of the immunity exception for sewage disposal system events.[1] We affirm.

This action arises from a June 2008 sewage backup that affected several homes in the Rose Terrace subdivision in Grosse Pointe Farms. The Homeowners' complaint asserted a claim invoking the exception to governmental immunity for a sewage disposal system event. The exception to governmental immunity on which the Homeowners rely provides in part:

> A governmental agency is immune from tort liability for the overflow or backup of a sewage disposal system unless the overflow or backup is a sewage

[1] MCL 691.1417(2).

> disposal system event and the governmental agency is an appropriate governmental agency.[2]

The City filed a motion for summary disposition in which it argued that the exception did not apply because it was not an "appropriate governmental agency" for purposes of the exception. "Appropriate governmental agency" is defined as:

> [A] governmental agency that, at the time of a sewage disposal system event, owned or operated, or directly or indirectly discharged into, the portion of the sewage disposal system that allegedly caused damage or physical injury.[3]

The trial court denied the City's motion for summary disposition and granted partial summary disposition in favor of the Homeowners[4] "because the undisputed evidence establishes that [the City] owned and operated the portion of the sewage disposal system at Rose Terrace Subdivision that allegedly caused the damage."

On appeal, the City argues that it does not own or operate the system that affected the homes in the Rose Terrace subdivision. We disagree. Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." Additionally, summary disposition may be raised pursuant to MCR 2.116(C)(7) if "a claim is barred because of immunity granted by law."[5] This Court reviews de novo both the applicability of governmental immunity and a trial court's decision on a motion for summary disposition.[6]

In making its assertion that it does not own the system that caused the alleged damages, the City relies in part on article III, § 4, of the subdivision restrictions, which states:

> The Association shall also be responsible for the maintenance, repair or replacement of any water, sewer or other utility mains servicing the Subdivision or expenses incident thereto which are not required to be borne by a public utility.

This restriction is not helpful in resolving the issue of ownership. It merely reflects the association's acceptance of responsibility for maintenance, repair, and replacement expenses for the system to the extent they are not covered by a public utility. It does not indicate that the association retained ownership over the system.

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[2] *Id.*

[3] MCL 691.1416(b).

[4] MCR 2.116(C)(10).

[5] *Plunkett v Dep't of Transp,* 286 Mich App 168, 180; 779 NW2d 263 (2009).

[6] *Id.*; *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999).

The City also relies on a city council resolution from 1982, which states that it refused to accept a dedication of the sanitary and storm water sewers and lift station located within the subdivision. The Homeowners, however, presented evidence that the City owned the system from the outset. The parties do not dispute that the sanitary sewer lines were constructed pursuant to a permit issued to the City in 1977. Since 1975, an administrative rule governing sewerage system plans has stated:

> (1) Before the construction or alteration of a sewerage system or portions thereof, plans and specifications therefor shall be submitted to the department for review and issuance of a construction permit.
>
> (2) The plans and specifications shall be submitted by the owner of the sewer system or treatment facility or alteration thereof or by his designated agent. When a person files plans and specifications as an agent of an owner, the owner shall furnish the agent with a letter of authorization for filing the plans and specifications, and the letter shall identify the plans or project and shall be submitted with the plans and specifications.
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> (4) When the owner of the proposed sewerage system is not a governmental agency, the application for a permit shall include a resolution from the local governmental agency having jurisdiction, stating that the governmental agency shall assume responsibility for the effective and continued operation and maintenance of the proposed sewerage system if the owner in any way fails to perform in this capacity. A copy of contractual or other arrangements between the owner and the governmental agency, which provide for the continuity of service agreement, shall also be submitted.[7]

Even if there were questions of fact concerning the ownership of the system at its inception, the evidence indicates that the City was the owner or operator as of 2008. In an application for a storm water discharge permit, the City represented to the Michigan Department of Environmental Quality – Water Bureau that, "There are no known nested jurisdictions within the City limits and there are no nested drainage system agreements with organizations, which, otherwise, would have had to obtain permit coverage on their own." In a September 11, 2008, letter, the City's director of public service addressed the investigation of the "recent sewer backups" in the Rose Terrace subdivision. He stated that the sewers had been inspected and were free from defects. The letter further states, "In addition, the sanitary mains in the Rose Terrace subdivision are on the City maintenance schedule for regular cleaning and inspection and have been serviced within the last five (5) years as required."

[7] 1975 AACS, R 299.2933.

In making its ruling, the trial court cited *Hooker v Grosse Pointe*[8] and *Jones v Crawford Co Rd Comm*[9] and indicated that acceptance of dedication may occur informally, "through user or expenditures of public money for the repair, improvement, and control of the property in question." The trial court then explained:

> The actions of [the City] demonstrated that it accepted the dedication by use and expenditure of money. The undisputed facts establish that permits were obtained in the name of [the City]. In addition, the sanitary mains in the Rose Terrace Subdivision were on [the City's] maintenance schedule for regular cleaning and inspection and had been serviced within the last five years prior to September 11, 2008. This evidence establishes that [the City] owned a portion of the sewage disposal system that allegedly caused the damage.
>
> The same evidence is undisputed and established that [the City] operated the sewage disposal system that allegedly caused the damage.

The City does not dispute the law on which the trial court relied.

The evidence that the City held itself out as the owner supports the trial court's determination that it was the owner of the system.[10] However, assuming arguendo that there were questions of fact concerning ownership, the City has failed to provide any reason to overturn the trial court's determination that it "operated . . . the portion of the sewage disposal system at Rose Terrace Subdivision that allegedly caused [the Homeowners' damages]." The undisputed evidence shows that the "sanitary mains in the Rose Terrace subdivision" were regularly cleaned, inspected, and serviced by the City.

Accordingly, the trial court did not err in determining that the City was "an appropriate governmental agency" for the purposes of the sewage disposal system event exception to governmental immunity.

Affirmed.

/s/ Deborah A. Servitto
/s/ Michael J. Talbot
/s/ Kirsten Frank Kelly

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[8] *Hooker v Grosse Pointe*, 328 Mich 621, 630; 44 NW2d 134 (1950).

[9] *Jones v Crawford Co Rd Comm*, 45 Mich App 110, 117-118; 206 NW2d 267 (1973).

[10] *Id.*; *Hooker*, 328 Mich at 630.